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cept in very gross cases, seems to be that provided for by the law itself, an appeal to a higher tribunal to review the sentence, or to the same court to reconsider at another time its own judgments. We cannot quit these volumes, however, without expressing our gratitude to Mr. Johnson for presenting them to the public. No lawyer can ever express a better wish for his country's jurisprudence, than that it may possess such a Chancellor and such a reporter.



- ART. XI.—1. *An Appeal to the Government and Congress of the United States against the depredations committed by American privateers on the commerce of nations at peace with us. By an American citizen.* New York, pp. 100. 1819.
2. *A proposed Memorial to the Congress of the United States.* Boston, pp. 8. 1819.

THE writers on national law distinguish between rules deduced by just reasoning from certain principles, and those which derive their force from common usage and consent. The former are of universal obligation, and are properly the law of nature applied to communities of men. The latter are fitted not so much to the goodness of an uncorrupted nature, as to the wants of one, that is depraved;* they are neither binding upon all, nor at all times; they are brought gradually into use, are received by some sooner than by others, and may be changed without any violation of natural justice.

There is not much difficulty in defining the rights of property and the obligations of contracts, as they exist between nations. Public justice differs not essentially in these respects from private. The facts once settled, it is as easy to decide by what acts one nation has injured another in a state of peace, as to determine when the rights of one individual have been invaded or withheld by another; as easy to pronounce what is a just cause of war, if we allow war for any cause to be lawful, as to judge of the grounds of a lawsuit. In most cases, indeed, it will be found that neither party in

* *Jus gentium secundarium dicitur, quod accommodatum [est], non tam incorruptæ naturæ bonitati, quam depravatæ necessitatibus.* Voet. ad Pand. L. i. t. 1. n. 18.

a war is entirely right, or entirely wrong, and through the mist of mutual crimination and defence, manifestoes, answers, insults, and aggressions, it will be difficult to discern the first offence. But this is a difficulty not attributable to any defect or uncertainty in the code of public law.

But there is also a law of war, and it forms by far the most important branch of the *jus gentium*. Whence is this to be deduced? How far are the reciprocal rights and duties of nations at peace destroyed by a state of war, and what are the new obligations, that grow out of this state? What are the limits to the right of destruction, and how are they to be known? Who shall say to mad revenge, ‘It is enough—stay thy hand?’ Where is the precise boundary, on one side of which are glory and honour and victory; on the other, rapine and murder? It will be obvious, that there must be great uncertainty, as to the extent of the power given to enemies over the persons and goods of each other, and that wars will be carried on with more or less cruelty, as nations are more or less advanced in humanity. Reason will afford little aid, and the restraint will be rather the effect of milder feelings, than of more correct judgment. The conqueror will be deterred from a passionate and vindictive abuse of his power, more by the fear of being disgraced as a barbarian, than of being condemned as a violator of public law. What was once a theme of applause will in time be followed by reproach and shame. What is fit and right to be done towards an enemy will depend more on usage, varying at different times and among different people, than on any conclusions of reason. We would be understood to speak, as most writers on national law have done, without reference to the commands or the counsels of religion, whether natural or revealed. These writers seem to have adopted, as a truth, the poetic declaration, ‘*nulla fides, pietasque viris qui castra sequuntur.*’ They have proceeded upon false principles. As some political sophists have derived the principles of the social compact from a supposed natural state of men, when every one stood single and independent, free to give or retain that entire sovereignty, which he enjoyed over himself; so jurists have sought in the condition of savage nature for the rights and relations of political societies. They have therefore considered a state of hostility, as a dissolution of all ties, and a license to all mischief. An enemy, in their view, cannot be injured. Charity

and humanity may be offended ; the atonement exacted may be greater, than would consist with that generosity and tenderness, which we esteem men the more for possessing ; but the sufferer cannot consider himself wronged, nor is any positive and binding law broken ‘It stands to reason,’ says Heineccius, ‘that against an enemy all things are permitted.’* And Puffendorf thus explains both the rights of belligerents, and the restraints, which humanity would impose upon the exercise of them : ‘from the moment, that any one declares himself our enemy, since we have every thing to fear on his part, we are authorized, as far as in us lies, to use acts of violence against him to any extent,† and with no other limit, than our will ;‡ but humanity requires, *that as far as the rules of military art allow*, we do no more injury to an enemy, than is necessary for our defence, for the vindication of our rights, and for our future safety.’.....‘Non id solum considerari vult, quid hostis citra injuriam possit pati, sed et quid humanum, adde et generosum victorem facere deceat.’ Grotius indeed limits the rights of war to what is necessary for attaining the end proposed, whether of self-preservation, just reparation, or merited punishment. [*Lib. 3, cap. i.*] But this, however just in theory, is too indefinite to afford any practical rule ; especially when it is considered, that hostilities are allowed to be continued, until satisfaction is obtained, not only for the original wrong, which was the cause of the war, but for all the expense and injury sustained in prosecuting it. And we learn from the same enlightened and benevolent jurist, that ‘by the laws of nations, the possessions of one party in a war are to the other, in all respects, as things without a proprietor,’§ and that ‘all are accounted slaves, who are made prisoners in solemn public war,’.....‘nor is an offence necessary, but the lot of all is the same, even of those, who, on the sudden breaking out of war, may be so unfortu-

* Hosti enim in hostem omnia licere rationi consentaneum est. *De Nav. ob vect. Sc. commiss.*

† A toute outrage. *Barbeyrac.*

‡ Licentiam concedit vim contra ipsum exerendi in infinitum, aut quantum mihi videatur. *De Jure Naturæ, Sc. lib. 8. cap. vi. § 7. De Officiis hom Sc. lib. 2. cap. xvi. § 6.*

§ Gentibus placuisse, ut res hostium hostibus essent non alio loco, quam quo sunt res nullius. *Lib. 3. cap. vi. § 8.*

nate, as to be found in the enemy's country.* Cocceius, the commentator of Grotius, goes somewhat further, and maintains, that 'an enemy is to be regarded as a criminal, deserving of death; hence, when the government declares war against any one, by that very act it gives to every citizen the right to inflict on him any degree of evil, to lay waste and plunder his possessions,' &c. Let us not, however, forget what we owe to Grotius. The lessons of moderation and humanity, which he gave as admonitions, have so approved themselves to the reason of mankind, that they have acquired the force, if not the character, of laws; and cruelties, of which he contented himself with saying, 'certe omittantur sanctius, et cum majori apud bonos laude,' would now cover with disgrace the conqueror, who should practise them.

Thus have the rights of war been deduced from the assumed position, that an enemy cannot be injured; that by the injustice or violence, which gave occasion to the war, he has forfeited all rights, and become as an outlaw; that his life, liberty, and property are at the mercy of the conqueror; that to spare may indeed be praiseworthy, but cannot be enjoined as an act of justice. And, as between nations there is no arbiter, each party in the war has all the rights of the injured, and is subject to all the penalties of the guilty. Justice must always be presumed to reside with good fortune or superior strength. Every subject, too, of the warring state, however ignorant he may be of the causes of the war, however peaceful and unoffending, has incurred a deadly guilt in the acts of his superiors, and is the object of unsparing vengeance, and unlimited punishment. Whatever *temperaments* have been admitted in the conduct of wars, have been the result of feelings and notions of humanity more or less refined, and views of policy more or less enlightened, as different degrees of knowledge and improvement have prevailed. 'Every people has a law of nations. The Mohawks even have theirs. They eat their prisoners, it is true, but they send and receive embassies, and acknowledge the rights of war and peace; the mischief is, that their law of nations is not founded upon true principles.' *Montesq. Esp. des Loix, lib. 1, ch. ii.* What Bar-

* Par omnium sors est, etiam eorum, qui, fato suo, ut diximus, cum bellum repente exortum esset, intra hostium fines deprehenduntur. *Lib. 3. cap. vii. § 1.*

beyrac, in his eloquent and beautiful discourse on what the laws only permit or allow, has said of civil laws, applies with still greater force to national jurisprudence. ‘We learn from the monuments of antiquity, that the first laws had scarcely any other origin, than custom, which is often a wretched master. Rules thus introduced are commonly established with little examination or reflection. Ignorance, prejudice, passion, example, authority, caprice, have manifestly a greater share in producing them, than reason. It is rather the opinion and decision of a blind multitude, than of the wise and virtuous.’

Had religion and the morality of the gospel been made the foundation of the rights and duties of states, in war as well as in peace, it is probable that many customs derived to us from ruder ages, perhaps even war itself would long since have disappeared. But rights have been sought for in another source, and religion has been permitted to interpose her counsels, not her authority, to moderate the use of that power, which reason and nature have been thought to bestow. Is it not probable, that some usages yet remain, which habit and prejudice, and an imaginary interest alone, prevent our regarding with the same abhorrence, with which we should now look upon the reducing of captives and their posterity to perpetual and irredeemable slavery? Have we yet confined the license of war within those bounds, which the law of charity would assign to it? Do we not even receive as principles of justice, some things which have no better support than the practice of earlier and less enlightened times, justified by an artificial reasoning, which, taking things as they are found, invents a plausible defence for whatever custom allows?

We have made these remarks more especially with a view to the practice of privateering. It is matter of just astonishment, that a species of warfare so repugnant to all our better feelings, so estranged from all that is deemed noble and honourable among men, should so long have prevailed. It is a practice, which can boast nothing of the chivalrous spirit, which we have been taught to admire in the warrior. It begins and ends in pure unmixed selfishness. It seeks neither fame nor power, but wealth; wealth, not the fruits of patient industry or honest skill, but wrested by the hand of violence or stolen by surprise and stratagem. It makes every

other consideration yield to a sordid avarice. In its greediness it hardly distinguishes between friend and foe, and is ever ready to pounce upon its prey, whether it be the property of an enemy, or that of a fellow citizen, which, by the rigid rules of war, has become the subject of confiscation as prize. The means, which it employs, are not less cruel and disgraceful, than its purpose is unworthy. It can make its way through blood to the treasure it gloats upon, lure by false smiles to destruction, advance securely to its object under the guise of friendship, ensnare by treachery, deceive by perfidy, and secure its unrighteous gains by shameless perjury. Not that every one who engages in this practice is under the influence of the vilest passions, insensible to shame, or stained with the blackest crimes. Many, we doubt not, whose lives prove them to be friends to religion and humanity, and who would scorn to enrich themselves by fraud or dishonesty, have adventured in privateering without reflecting upon its nature and tendency. They have been deceived by the legality of the practice. Perhaps, even, they have persuaded themselves that, while they improved their own fortunes, they were displaying a patriotic zeal for the service of their country. As long as privateering is countenanced and encouraged by public authority, there will be many estimable men, who, looking no farther than to what the law allows or forbids, are blind to the immorality of preying upon their fellow creatures. A solemn responsibility, then, rests upon those who govern. Nations, by a common consent, should relinquish a custom so inseparable from abuse and licentiousness, so vexatious to commerce, and so little under the control of wholesome laws.

There is no doubt that great antiquity may be pleaded for the practice of plundering. For several ages after the irruption of the Northern barbarians, war and plunder might almost be considered as individual rights. Every petty baron enjoyed the privilege of taking up arms, and every vassal was free to seek his fortune in predatory incursions upon the enemy, whether by land or sea.* The infidel powers, which bordered the Mediterranean, covered that sea with small piratical vessels; and the Christian states, whose commerce suffered from their depredations, partly in self-defence and partly in the hope of gain, fitted out small cruisers or armed their merchant ships. It was most common for many

persons to unite for this purpose in a sort of partnership. No public commission was required. Against infidels it was the right and duty of every Christian to wage incessant hostility, and to do them all possible injury.* At the same time, the inhabitants of the North sent their fleets to make descents upon the coasts and enrich themselves with the wealth and luxuries of the South.† They were most often conducted by private adventurers, whose bravery or skill caused them to be selected as chieftains. Piracy was a common trade, and the word was far from carrying with it the ideas of criminality and disgrace, which we now attach to it. Selden cites a passage from Asserius, who was the preceptor of king Alfred, in which he says, that this prince ‘caused long ships to be built for the purpose of defence against enemies approaching by sea,—*impositisque piratis in illis vias maris custodiendas commisit* ;’ on which Selden remarks, that ‘this word “pirates” is not here used for robbers, as it now commonly is, but for such as attacked the enemy’s fleets in naval warfare.’‡ So the term ‘corsair,’ from the Italian *Corso*, is the generic term of pirates and privateers. *Martens on Privateers*, p. 2. note. The truth is, that in an age when the obligations of humanity were neither acknowledged nor understood, and every person might make such use of his strength or his cunning, as seemed to him best, so as he did not invade the property of those to whom he was bound by the tie of a common allegiance; and when the sanction of the prince was not necessary to enable private persons to attack and plunder the enemy, there could be no distinction between authorized and unauthorized depredations on the ocean. ‘The Gauls,’ says Cleirac, ‘*regarded all strangers as enemies*, and not only robbed them of their goods, but put them cruelly to death, offering them, as bloody sacrifices, to their false gods.’§ And Boucher: ‘In the height of the feudal

* Martens.

† ‘The ravages of the Normans are hardly mentioned before Charlemagne. It was then they began those cruises, which made them the terror of other nations.’ Boucher Consul. de Mer. p. 494.

‡ Selden’s *Mare Clausum*, Lib. 2. cap. 10.—quoted Robinson’s Coll. Mar. p. 21. ‘and embarking *pirates* in them employed them to guard the approaches by sea.’

§ ‘Les gaulois réputaient tous les étrangers pour leurs ennemis, et ne les expoliaient pas seulement de leurs biens, mais en outre ils les mettaient cruellement à mort, et en faisaient de sanglans sacrifices à leurs faux dieux.’ Us et Cout. de mer. p. 95.

anarchy, that is to say, in the ninth century, every person might act the part both of judge and executioner, without any incompatibility in the two conditions and without disgrace. *At that period mariners were a set of robbers.* *Consulat. de Mer. vol. i. p. 74.* The inhuman law of wreck, first relaxed in England by the act of Henry I, providing, that the property should be saved from forfeiture, if any person escaped alive from the ship, is a memorable instance of the same savage state of manners. *See Hume, reign of Henry II. Black. Com. chap. 8, book i. Boucher, Consul. de Mer. vol. i. p. 490.*

It is in vain then for the apologists of privateering to have recourse to these remote ages in support of the assertion that the practice has long or always existed.* Even were antiquity a less doubtful plea than it is, the argument proves nothing, but that in those benighted ages men robbed of their own heads, and that in these more civilized times we have so far improved, as to sanction the proceeding by public authority. The modern practice is better than the ancient, inasmuch as some excesses may now and then be prevented by the control of government over privateers, and it is convenient to be able to denote piracy by the absence of a lawful commission; but the question remains, whether it is morally right, or politically expedient, for governments to grant such commissions, or for individuals to act under them? And this question can never be answered by saying that men were accustomed to rob for a long time, before it began to be necessary to have a public commission for doing it. It was found necessary to impose restraint upon private and unauthorized violence, even between the subjects of hostile powers. This was a declaration, that the ancient practice was only fit for a state of society, as barbarous as that in which it existed. Something, doubtless, has been gained by the restriction of acts of war to those, whose hands are armed by the sovereign power; but whether this gain has been great, or the most essential evils connected with private plunder have been remedied, let history speak. We appeal to the loud and incessant complaints of neutrals, of whose commerce privateers have been justly called the scourge; and to the tortures and cruelties inflicted by these 'judges and exe-

* See note to Martens on Privateers, p. 20. Willenberg derives privateers from Theute, queen of Illyria—and Valin maintains that they have existed at all times.

cutioners,' of which the annals of privateering, ancient and modern, afford so many examples.

It is probable that the practice of nations in the disputes arising between them or their subjects, has followed the same course of improvement with their municipal laws. Every one, who has attended to the history of criminal jurisprudence, knows that, not many ages since, every individual possessed the power of punishing, and the avenging of wrongs was left to the injured party or his friends.* But as the world grew wiser and more inclined to peace, a check was put upon the right of private revenge, and tribunals began to inquire into the fact, and to measure the punishment in proportion to the guilt. So, among nations, the frequent broils occasioned by the hostile attempts of individuals, gave rise by degrees to the custom of granting letters of reprisals. At first, doubtless, they were only given in a few instances, and subjects continued to attack and plunder without asking the permission of the sovereign. The *Consolato del Mare* contains an entire chapter regulating with great precision the conduct of armed cruisers, and the division of their plunder. Not a syllable appears of any public commission being necessary, or even a judicial condemnation of prizes. The publication of the first Catalan edition of this collection is supposed by Boucher to have been about 1494, and he carries the compilation as far back as the beginning of the tenth century. But its origin is fixed with more probability between the years 1250 and 1266.† This code is commonly supposed to have been first compiled in Barcelona, and it is in the Mediterranean, where commerce was preyed upon by the Barbary corsairs, that we should expect to find the practice of private cruising most prevalent. Letters of marque and reprisals were issued upon the petition of a subject, who complained of injustice done to him by some foreign prince or subject, and they empowered the party receiving them, whether an individual or a community, to obtain satisfaction by seizing the goods of any subject of the offending state. They were limited to the restitution of what had been unjustly taken or withheld, or compensation in damages for the injury suffered.

* See Kames' Historical Law Tracts.

† Martens, p. 6.—and this is the assertion of Giannoni, in his History of Naples, book xi. chap. 6. But see note to the preface of Robinson's translation of the prize chapters. The chapters relating to this subject were probably added at a period subsequent to the original compilation.

Reprisals are sometimes spoken of, as a means of preserving peace, because wrongs were thus remedied by a sort of violence, which is compared to that used in the execution of legal sentences between subjects of the same state, without the extreme resort of war.* The earliest instance of reprisals recorded in England, was in 1295, when Edward I. granted to a subject, ‘*licentiam marcandi homines et subditos de regno Portugalliæ et bona eorum per terram et mare.*’ *Rymer*, vol. ii. p. 691. *Anderson*, vol. i. p. 136. It does not seem to have been considered *necessary* to be provided with letters of reprisals until the fourteenth century, and no mention is made of them in treaties prior to that time. *Martens*, note, p. 10. The right of making reprisals is said to have belonged to every magistrate and even to private subjects until the reign of Charles VII. in France.† *Puffendorf*, *de Jure Nat. &c.* lib. 8, chap. 9. § 13, not. 2. A law was made in France concerning them in 1345. *Martens*. There are frequent instances in *Rymer* in the fourteenth and fifteenth centuries.‡ An act of the English parliament of the year 1353, 27 Edward III. provides, ‘that no foreign merchant shall be troubled or impleaded &c. provided, that if any of our liege subjects, merchants or others, be injured by any lords of foreign lands, or their subjects, and the said lords, upon due request, refuse to do justice, *we shall have the right of mark and reprisals*, as has been used in times past.’ *Martens*, p. 12, note. An ordinance of Charles VI. of France of 7 Dec. 1400, forbids

* Puffendorf defines them, ‘*violentæ executiones in cives aut bona civium alterius reipublicæ, quæ justitiam administrare detrectat.*’ *De Jure Nat. &c.* lib. 8, c. 6, § 13.

† This is probably a mistake for Charles VI. See his ordinance mentioned afterwards.

‡ Vol viii. p. 96—*Fr. ed.* vol. iii. part 4, p. 166, year 1399—letters granted by Henry IV. commanding his admirals and other officers to seize the ships and goods of subjects of the Earl of Holland in English ports, reciting with great care the previous demands and refusal of justice. *Rymer*, *Fr. ed.* vol. iv. part 1, p. 161, year 1409—granted by Henry IV. to the Sire de Casteillon to enforce the performance of contracts made with him by the subjects of the king of Arragon, commanding all public officers to assist him, and to keep all prizes safe in their fortresses till the contracts are fulfilled. *Rymer*, *Eng. ed.* vol. viii. p. 717, year 1411—against the Genoese. *Rymer*, *Eng. ed.* vol. viii. p. 755, year 1412—against the persons and goods of the French, limited to the satisfaction of the actual damage—*Anderson*, vol. i. p. 239, another instance against the Genoese, limited in sum, year 1413. In the year 1379, Richard II. is said to have granted to the people of Dartmouth a general cruising commission against the French, and in 1335, the inhabitants of that town took some French vessels.

any subject to fit out ships at his own expense for carrying on war against enemies, without license first obtained from the admiral or his lieutenant. *Code des Prises*, tom. i. p. 1. *Robinson*, *Coll. Mar.* 75. *Martens*, p. 18.* From this ordinance and from other documents, it is probable, that in the fifteenth century commissions began to be issued to private subjects in time of war, similar to those which were granted for making reprisals in time of peace. They retained and still retain the name of ‘letters of marque and reprisal,’ and, at this day, the issuing of them is often the first declaration of war. It is, however, very certain, that the practice of granting commissions to privateers did not become general before the end of the sixteenth century. The first instance, in which their aid appears to have been considered important in carrying on the war, was in the contest between Spain and her revolted provinces of the Low Countries, which began in 1569. In 1570, the Prince of Orange, in the hope of replenishing his impoverished finances by seizing on the money sent from Spain to the Netherlands, issued commissions to many of his adherents, authorizing them to cruise against the ships of Spain. A considerable fleet was equipped, and, increasing daily in number, they soon became terrible by their depredations not only on the commerce of Spain and the Netherlands, but on that of their own and of other countries. It is said, that their country suffered from them not less than from the despotism and cruelty of Alva. As the confederated reformists had themselves been called in derision *gueux*, or beggars,† these free-booters were called *gueux de mer*, or sea-beggars. *Eng. Univ. Hist.* vol. xxvii. p. 388. Many of them were punished by Spain and other nations as pirates, not so much, it is said, on account of their excesses, as of the supposed illegality of their commissions. *Martens*, chap. i. § 7. The French, however, may probably claim the distinction of having first sent out, in any considerable numbers, these scourges of the sea. Their code exhibits the most ancient regulations concerning privateers, and it is well known, that their maritime laws have always been the most severe against the commerce of neutrals. De Thou relates,‡ that in 1555,

* An English act of Parliament to the same effect was passed A. D. 1414, 2 Hen. V, c. 6; and a law of the emperor Maximilian respecting the admiralty of the Low Countries in 1487, ‘ordered, that no person should fit out a ship for a cruise without the express permission of the admiral or his lieutenant.’ *Martens on Privateers*, p. 18.

† De Thou, tom. v.

‡ Hist. tom. ii. p. 633.

the French king, having received advice that several Dutch ships of great burthen were returning from Spain, laden with every sort of valuable India goods, gave orders to the inhabitants of Dieppe, unquestionably the most experienced mariners in France, to equip such vessels as they could find in the ports on the coast of Normandy, and seize this rich fleet. The *privateersmen* of Dieppe,* having fitted out for cruising nineteen ships and six brigantines, under the command of Epineville, a celebrated mariner, met the Dutch opposite to Dover. A most obstinate battle ensued, which lasted six hours. Many ships on both sides were burned; the flames drove the French from their own ships into those of the enemy, and having more men, they made many of them prizes. The Dutch lost a thousand men, and the French four hundred.

The English seem not to have been slow in imitating the example set them by the French and Dutch. In the year 1586, we are told by the author last quoted,† before war had been declared between England and Spain, Philip II. seized and confiscated the goods of the English merchants. The English, under pretence of reprisals, set themselves to pirating over the whole ocean, harassing the navigation not only of the Spanish and their allies, but even of the people of the Low Countries, whom they robbed without distinction. The merchants of the United Provinces in vain sought redress in the English admiralty. But the queen, Elizabeth, wearied by the complaints which came to her from all quarters, made severe regulations, requiring cruisers to give security not to meddle with any ships but those of Spain, and not to dispose of their prizes till they had been regularly condemned in the admiralty. ‘The piracies,’ says De Thou, ‘were checked for a time by these decrees; but means were soon found to evade them, under pretence of privileges, or by means of subtleties, which persons in power connived at.’‡

* *Les armateurs de Dieppe ayant armé en course, &c.*

† De Thou. Hist. tom. ix. p. 545.

‡ See in Robinson's Coll. Mar. a proclamation of Elizabeth of the year 1602, reciting the great extent of the piracies complained of, and forbidding any man of war to be fitted out without license and surety. The preamble refers to other laws and orders lately published, ‘upon the growing on of these fowl crimes and piracies colored by other voyages.’ And in the Statuta Admiralitatis of Master Rowghton, printed in Clerke's Praxis, p. 161. we have an ordinance of 1591, requiring presentment to be made of all those, that *since the late proclamation* have had traffic with the

Spain and England, shortly after the depredations committed under the commissions of the Prince of Orange, issued commissions to great numbers of privateers. The expeditions of Drake and Frobisher are said to have been of this nature.* In 1625, James I. found it necessary to issue letters patent addressed to the High Admiral, reciting the great losses and damages sustained by many of his subjects, by the surprising and taking of their ships and goods by the subjects of Spain in the Low Countries, and by those of the States General, and that justice having been demanded in vain, his subjects had made humble suit to him for letters of reprisals. He, therefore, requires the Admiral to grant commissions for taking the ships of the Low Countries and States General to such of his subjects as had been so damnified.† In 1627, Charles I. granted reprisals against the French to such of his subjects as had had ships or goods taken by the French, and a war followed in the same year. *Anderson, vol. ii. p. 27.* In that same year too, we are told, that Charles was obliged to fit out an armament to protect the coal trade against privateers from the Spanish Netherlands. *Anderson, vol. ii. p. 29.* The Dutch war for independence ended in 1648. Towards

leaguers in France, and of all who have set out ships without commission, and to inquire what ships and goods have been taken at sea without commissions, and of breaking bulk and disposing of prizes before sentence of the admiralty, and what captains &c. under colour of commissions of reprisal have boarded, taken, &c. ships of England, France, &c. Holland, Zealand, &c.

* Martens, p. 26. And in the debate upon Pulteney's Act for encouraging privateers, 1739, Pulteney argues from this, as an instance of the spirit and power, with which private adventurers could act. 'It was,' he says, 'to private adventurers, that all the success of Sir Francis Drake was owing.' *Parl. Deb. v. xvii. p. 415.* We have great doubts, however, whether these expeditions are to be classed with cruises of privateers. Drake's was an expedition fitted out for the purpose of attacking Spain in her home dominions. Elizabeth furnished about 30,000*l.* and several ships, and Drake and his associates supplied the residue. The spoils were to be equally divided between the queen and the fleet. *De Thou, vol. x. p. 693.* There is an important difference between the employment of ships equipped at private expense, but hired by the public and sailing in fleets with the public forces under the government of naval officers; and cruises performed by one or more ships under the orders of private adventurers. See also *Lee on Captures, p. 199.* It seems to have been an ancient practice to use, in warlike expeditions ships under the wages of the king, and to give them a part of the prizes. See the ancient articles of the admiralty subjoined to Clerke's Praxis, p. 163, A. 19.

† Rymer, Fr. Ed. vol. vii. part 4. p. 185.

the close of it, in 1643 and 1645, the *placarts* or decrees of the States General held out great encouragements to privateers. *Martens*, 26. In that long continued contest the use of these instruments had become familiar. Treaties and laws were made for defining their rights, and preventing the abuses to which they were found to have so strong a tendency.* But new discords kept alive the spirit of plunder, and privateers still found favour, as a cheap means of carrying on war through the instigation of private avarice. In 1634, disputes began between the English and Dutch. The Northern fishing, and the sovereignty claimed by the British in the narrow seas, were the chief subjects of contention. England, in the mean while, was disturbed by civil wars, and the parliament party was not likely to omit any means of annoyance, which had heretofore been employed with success. In 1643, exasperated by the cessation of arms in Ireland, ‘they forbade all masters of ships to bring over any officers or soldiers, on penalty of the forfeiture of their vessels, and gave letters of mark to merchants and others, who would fit out ships at their own expense, empowering them to take to their own profit all such ships and goods as they should meet coming over with soldiers or warlike stores for the king.’† The friends of the king were not slow in retaliating this measure, for in 1644 the goods of the merchants trading in France were seized, and letters of marque granted against all that adhered to the Parliament. *Whitelocke*, p. 130. Of the activity of private cruisers in the hostilities which ensued, the reader may satisfy himself by referring to the book last quoted, where he will find instances of mutual depredation, more numerous than we have any disposition to record. Doubtless, the practice was attended with much abuse and licentiousness. In the year 1650, April 16, ‘an act passed for preventing wrongs and abuses done to merchants at sea,

* *Martens*, p. 26. Voet ad Pand. vol. 2. p. 602, speaks of the ‘naves privatorum prædatorias permissione ordinum instructas,’ and cites the Admiralty instructions of 13 Aug. 1597, and decrees 1 April 1602, and 28 Jan. 1631, and he adds, that the decrees of 9 Aug. 1624, and 22 Oct. 1627, required all prizes to be brought into port before breaking bulk, ‘that the republic and others might not be defrauded of their due portion of the plunder.’

† Neal’s History of the Puritans, ch. 12. *Whitelocke* says, ‘they granted letters of marque against all such as had taken up arms against the Parliament, or assisted the Irish rebels.’ *Memorials*, p. 76. year 1643.

and prohibiting mariners from serving foreign princes or states without license.' *Whitelocke*, p. 451. Soon after this, in 1652, the Parliament and the Dutch came to open hostilities, and an active course of privateering commenced between them.* From their near neighbourhood and their former habits, there can be no doubt that during this two years' contest they kept up this sort of warfare in its worst form.

The restoration of the king made no alteration in the policy of the English as it respected their rivals, the Dutch. The scheme of maritime superiority was carried on in the same spirit which had dictated the navigation act. Privateers found great favour in the eyes of the court,† and the passage we are about to quote from the *Life of Clarendon* will show, that this is an important epoch in the history of the practice. It is the more remarkable, as it is from the pen of that virtuous chancellor himself. It relates to the period, 1664, when the ministers of Charles II. provoked a new war with the Dutch, in the prosecution of their great design of becoming the exclusive masters of commerce.

'It was resolved, that all possible encouragement should be given to privateers, that is, to as many as would take commissions from the admiral to set out vessels of war, as they call them, to take prizes from the enemy; which no articles or obligations can restrain from all the villany they can act, and are a people, how countenanced soever, or thought necessary, that do bring an unavoidable scandal, and it is to be feared a curse upon the justest war that was ever made at sea. Besides the horrible scandal and clam-

* July 19. New letters of marque granted by the states against the English. 12 Aug. A Dutch private man of war taken and sunk by two English ketches. *Whitelocke*, p. 539—541. and see pages 545—547.

† This may be inferred from the treaty made between the Dutch and Charles II. in 1674, which Postlethwait, [*Dict. Art. Privateer*] says, 'is fit to be a standard to all nations.' The preamble runs thus: 'and where, as the masters of merchant ships, and likewise the mariners and passengers do sometimes suffer many cruelties and barbarous usages when they are brought under the power of ships, which take prizes in time of war, the takers in an inhuman manner tormenting them, thereby to extort from them such confessions as they would have to be made; it is agreed that both his majesty and the Lords, the States General, shall by the severest proclamations or placarts, forbid all such heinous and inhuman offences &c.'

There was an article with France to the same purpose in the treaty of Utrecht.

our that this class of men brought upon the king and the whole government for defect of justice, the prejudice, which resulted from thence to the public, and to the carrying on the service is unspeakable. All seamen run to them, and though the king now assigned an ample share of all prizes taken by his own ships to the seamen, over and above their wages; yet there was a great difference between the condition of the one and the other. In the king's fleet, they might gain well, but they were sure of blows; nothing could be got there without fighting. With the privateers there was rarely fighting. They took all who could make little resistance and fled from all who were too strong for them. And so these fellows were always well manned, when the king's ships were compelled to stay many days for want of men, who were raised by pressing, and with great difficulty.' p. 242. From this time privateers have been common in all wars between maritime countries, and governments have endeavoured, by the most liberal encouragements, to increase their number, and whet their thirst of plunder. At the same time, the evils suffered from them and the loud complaints of neutrals, have caused various expedients to be resorted to for checking their excesses, while their use has been continued. The great increase and wider extent of commerce have added to the opportunities and the temptations for growing rich by this sort of authorized violence; and it has hitherto been found impossible to impose any effectual restraints upon forces of so low a character, and called into action by motives so unworthy and sordid.*

From this historical deduction, it appears, 1. That the practice of privateering is truly what it has been called, 'a remnant of the ancient piracy,' and has its root and origin in the general license of plundering, which we justly regard as the vice of a barbarous and lawless age. 2. That the public commissions, under which it is now carried on, were expedients adopted, when the world began to assume a more regular and settled form; the first step towards a state of society more consistent with reason and humanity. 3. That

* Immediately after the war of 1756 had commenced, the English privateers began to swarm in the channel, and to commit depredations upon the commerce of friendly nations. The Dutch complained, and in 1759 an act was passed, prohibiting commissions to any vessel under one hundred tons burthen and forty men. *Smollett's Contin. vol. 6. p. 151—294.*

at first, letters of reprisals authorized the seizing of goods on the land, as well as at sea.* 4. That the first notice we have of privateering to any considerable extent is the measure, to which in the outset of the war of the Netherlands, poverty and revenge drove the Prince of Orange; and that these privateers became notorious for their piratical depredations. If before that it was practised by the French, it was not under circumstances more honourable, nor with less cruelty. 5. That the practice has always continued to answer well to its original; privateers having been, in earlier and later times, the ‘scourges of neutral commerce,’ a continual theme of complaint to neutral powers, the causes of new wars, subjects of negotiation in treaties, and of frequent restrictive laws; but still eluding all attempts to put a stop to their abuses, and reverting to their primitive character.

It is now time to turn our attention for a moment to the practice of war upon land, and here we are at once struck with a strange difference in conduct and opinions. It would seem, that while we have been growing more refined and generous in hostilities by land, we have certainly not improved, and it is to be feared, have even become less attentive to considerations of equity and humanity, in our maritime warfare. We can claim, in this respect, no superiority over the men of two centuries ago. Like them, we set upon the peaceful merchant to rob him of his property, and if those, to whom he has entrusted it, defend it faithfully, we suffer no tenderness for life to keep us from our booty. On the land, do we ever hear of an honourable commander’s delivering up to pillage a captured city, unless induced by some extraordinary violation of the rules of honourable warfare in the enemy? Does he ever seize the merchandize of the inhabitants or disturb them in the exercise of their trades? Why, then, on the sea should captured ships and the goods they are freighted with, pursuing peacefully their course, and engaged in the useful interchange of the products of different lands, become a prey to the rapacious cruiser? The most, that is allowed upon the land, is the exaction of a tribute, and even of this, we suspect the instances are becoming rare, and it is regarded as somewhat disgraceful. But if even the commander of an

* See letters granted by Edward I, ante, p. 175, and the form in Rymer, tom. iv. part 1, p. 161, French ed.

invading army forbears to touch any property, but that of the sovereign, what should we say, if bands of private adventurers were commissioned to enter the enemy's borders to rob and pillage for their own profit? Should we not regard it much in the same light, as we should the use of poison, or assassination, or infernal machines?*

How, then, shall we reconcile this inconsistency? A late writer has, we think, given the true account of it. The jealousy of commerce has entered much into all the wars between maritime countries from the time of Cromwell's war with the Dutch. To exhaust the commercial resources of the enemy, and so to cripple his trade, that he may not be able to resume it upon fair terms of competition, when peace shall be restored, has been one of the objects proposed by one or the other of the belligerent powers. Privateers, as the most destructive assailants of commerce, have for this cause been encouraged and protected, and the exemption granted upon the land to the property of peaceful subjects has been denied at sea. 'From thence arises that striking inconclusiveness,† [inconsistency] which has been so frequently declaimed against, that, whilst in wars on the continent, the civilized nations of Europe (so long as they do not betray that character) endeavour to make the burthen of it fall as lightly as possible on the peaceable subjects of the enemy, and that they respect their property in consideration of a contribution levied, by authorizing *pillage* only in some extraordinary cases, the barbarous practice has been retained, in maritime wars, of depriving hostile subjects of their ships and their cargoes, by prohibiting now, almost universally, the acceptance of a ransom.'‡ *Martens on Privateers*, p. 22.

That some cause, like that here suggested, has retarded the progress of civilization in the customs of maritime war,

* As to what are unlawful arms, see Martens, *Precis du droit des gens*, t. ii. p. 351, and also as to the difference in the rules respecting property on land and at sea.

† We copy from the English translation, published in 1801.

‡ It appears that in Holland, by an edict of the Earl of Leicester, of 4 Apr. 1586, all captures, whether by land or sea, were brought before one tribunal, and the counsellors of the states of Holland, formerly, as appears from their ancient forms in 1590, adjudged upon the plunder obtained by the soldiers on the land. But, says Bynkershoek, 'I do not find this in their new form, 4 Oct. 1670, nor is it observed in practice.' *Quest. Jur. Pub.* lib. i. cap. 18.

can hardly be doubted, when we consider how many of the most distinguished writers, ancient and modern, have declared their disapprobation of the practice of privateering. To begin with Albericus Gentilis, who was professor of law in one of the English universities, from the year 1582 to his death in 1608. Privateers, as we have seen, had then first begun to be used to any considerable extent, and to be recognized by stipulations in treaties.* Gentilis, in his book *de Advocacione Hispanica*, speaks of them under no other name than ‘pirates,’ and will not admit them to be entitled to any better consideration. Grotius says, it is worth inquiring, how far the right of private captures may be carried, without violating internal justice or charity.† And after showing that by the law of nature no injustice is done to the enemy, if the plunder be confined to a compensation for the injury which caused the war, he adds, that ‘although justice, strictly speaking, may not be violated, yet there may be an offence against that moral duty, which consists in loving others, as by the law of christianity we are especially commanded; as if it should appear that such depredation will fall, not upon the hostile commonwealth, or the sovereign, or those, who are in themselves guilty, but upon the innocent, and that it will reduce them to such a measure of distress, as it would not be lawful for us to inflict even upon our private debtors. But if, in addition to this, such depredation will neither be of great effect in putting an end to the war, nor in cutting off the enemy’s strength, then indeed an honest man, and more especially a christian, will scorn to profit by the calamity of the times.’ *Lib. 3, cap. xviii. § 4.* From this and other passages of Grotius, it cannot be doubted, in what light he regarded privateering, as in fact carried on. We have already quoted the opinion of Clarendon, than which none can be entitled to greater respect. The treatise of Molloy *de Jure Maritimo*

* Bynkershoek, Q. J. P. lib. i. cap. 18, seems to refer the origin of privateering to the war of the United Provinces with Spain, for he mentions no earlier instance. ‘Olim in Belgio Fœderato fuerunt privati, qui ipsi naves bellicas exercebant, quibusque, præter premia, ex captis et recuperatis navibus redacta, ex publico ærario numerabatur certa pecunia pro modo expensarum, et pro modo temporis, quo operam bellicam præstabant. Illæ naves privatorum dicebantur *Kruysers*, usque adversus Hispanos cum maxime usi sunt Ordines Generales.’

† Id vero quatenus procedat, illæsa justitia interna et charitate, non immerito quaeritur.’ *Lib. 3, cap. xviii. § 2.*

was first published in 1676 ; many editions have been published since that time, and its reputation is deservedly great. ‘Most certain,’ says this writer, ‘these sorts of capers or privateers, being instruments found out but of later ages, and ’tis well known by whom, it were well they were restrained by consent of all princes ; since all good men account them but one remove from pirates, who, without any respect to the cause, or having any injury done them, or so much as hired for the service, spoil men and goods, making even a trade and calling of it, amidst the calamities of war.’ *Book 1, ch. iii.*

§ 15. The compilation, entitled ‘Sea Laws,’ was published early in the last century. We find in it this passage, ‘Our laws take not much notice of these privateers, because *the manner of warring is new and not very honourable*, but the diligence of our enemies in this *piratical way* obliges us to be also as diligent for the preservation of our commerce.’ p. 472. So Beawes, whose *Lex Mercatoria* was compiled in 1750, ‘The use of these sort of vessels we were taught by our neighbours, and obliged by their example to encourage them,’ &c. p. 207. Loccenius, who was professor at Upsal in 1670, seems, like Gentilis, to have known no distinction between privateering and piracy. His words are, ‘When a naval war is unavoidable, it is far better to assail the enemy with domestic levies or hired marines, under officers and discipline, or to depend on the aid of allies, than to give license to pirates, the vilest of mankind, who, once authorized to plunder, soon forget all restraint, and spare not even friends, nor those, who have never injured them or their employers.’* If we come down to more modern times, we find Mably† and Galliani,‡ supporting the justice and expediency of exempting commerce from the calamities of war. But especially *Linguet*, whose essay we would quote entire, if it were possible, has exposed in the clearest manner the absurd contradiction in practice, to which we have already referred.§ ‘It is,’ to use his words, ‘one among a thousand

* Sed et si belli maritimi necessitas incumbat, præstat delectis domesticis, aut militibus nauticis mercenariis, qui sub duce et disciplina degant, aut sociorum ope, quam colluvie pessimorum hominum, piratis, adversus hostes uti, qui licentiam spoliandi nacti, facile præscriptos fines excedunt ; ut ne quidem amicis aut aliis, a quibus vel ipsi, vel eorum patroni nunquam læsi sunt, parcant.’ *De Jure Mar. et Nav.* lib. 2, cap. iii. § 4.

† *Droit Public*, tom. 2, cap. xii.

‡ *Lib.* 1, cap. 10.

§ See this able paper in *Annales Politiques*, tom. v. p. 518.

proofs of the confusion, barbarism, and extravagance of all our principles, of every sort. Whence comes this difference between fleets and armies, squadrons and regiments, corsairs and hussars ?' He thus concludes a glowing description of the circumstances which principally give a character to privateering ; ' It is cowardly, for its object is to attack the unarmed ; it is odious, for it has no other principle than a base self-interest ; it is barbarous, for the flying merchant-ship is compelled to submit by murderous broadsides ; nor is it uncommon for a part of the crew, at the moment of striking the flag, to be slaughtered by the balls that brought the order for striking.' Martens has expressed himself in language not less clear and decisive. ' Glory and duty call an officer to fight the enemy, whenever the interest of his sovereign is concerned, and honour is the best reward for his labours and his dangers ; it is not so with the privateer. Indifferent to the fate of the war, and often of his country, he has no other inducement but the love of gain, no other recompense but his captures and the prizes conferred by the state on his privileged piracies. To encourage individuals to fit out privateers at considerable expense, it is necessary to present them the allurements of a rich booty, and, by prescribing them a moderation, which they are fully determined not to observe, not to intimidate them by imposing on them too many restrictions.' p. 24. The opinion of Dr. Franklin we shall have occasion to quote hereafter. The apologists of privateering have, we believe, rested its defence on the sanction given to it by law, and have contented themselves with showing, that there is a real and substantial distinction between privateers and pirates. Azuni, one of the latest and most distinguished of these apologists, after mentioning the opinions of Galliani and Mably, adds, that he respects their opinion, and would adopt it, ' if he were speaking as a mere philosopher.'

It is wonderful, when we consider how much the commerce of neutrals has suffered from privateers, that more frequent efforts have not been made to put a stop to the practice by the general consent of nations. Our own history furnishes indeed a fact, which cannot fail to gratify the feelings of an American. ' As early,' says the Memorial before us, ' as 1785, the celebrated philosopher, Dr. Franklin, in a letter to a friend, observed, that " the United States, though better

situated than any other nation to profit by privateering, are, as far as in them lies, endeavouring to abolish the practice, by offering in all their treaties with other powers an article engaging solemnly, that in case of a future war, no privateer shall be commissioned on either side, and that unarmed merchant-ships on both sides shall pursue their voyages unmolested." p. 6.* It was accordingly stipulated in the 23d article of the treaty with Prussia, in 1785, as follows :

‘ And all merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessities, conveniencies, and comforts of human life more easy to be obtained and more general, shall be allowed to pass free and unmolested ; and neither of the contracting powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels, or interrupt such commerce.’

Martens† has taken notice of this article, adding, that ‘ this example, worthy of imitation, has not been hitherto followed by other states.’ Dr. Franklin, to whom, doubtless, the credit of this humane scheme belongs, has elsewhere expressed his opinion in emphatic terms. The author of the *Appeal*, mentioned at the head of this article, quotes a passage from the propositions relative to privateering, communicated by Dr. Franklin to Mr. Oswald, 14 Jan. 1783, in which the principal reasons of policy for abolishing the practice are forcibly stated.

‘ It is for the interest of humanity in general, that the occasions of war, and the inducements to it, should be diminished. If rapine is abolished, one of the encouragements to war is taken away, and peace therefore more likely to continue and be lasting. The practice of robbing merchants on the high seas, *a remnant of the ancient piracy*, though it may be accidentally beneficial to particular persons, is far from being profitable to all engaged in it, or to the nation that authorizes it. In the beginning of a war some rich ships, not upon their guard, are surprised and taken. This encourages the first adventurers to fit out more armed

* Letter to B. Vaughan, Esq.—Franklin’s Works, vol. ii. p. 448.

† Essay on Privateers, p. 31, note.—The only instance of a similar attempt, mentioned by him, is that of the agreement between Sweden and the United Provinces, when at war in 1675, that neither they nor their allies should make use of privateers—but the agreement was not performed.

vessels, and many others to do the same. But the enemy, at the same time, become more careful, arm their merchant-ships better, and render them not so easy to be taken ; they go also more under protection of convoys ; thus, while the privateers to take them are multiplied, the vessels subject to be taken and the chances of profit are diminished, so that many cruises are made wherein the expenses overgo the gains ; and as is the case in other lotteries, though particulars have got prizes, the mass of adventurers are losers, the whole expense of fitting out all the privateers, during a war, being much greater, than the whole amount of goods taken. Then there is the national loss of all the labour of so many men during the time they have been employed in robbing ; who, besides spending what they get in riot, drunkenness, and debauchery, lose their habits of industry, are rarely fit for any sober business after peace, and serve only to increase the number of highwaymen and housebreakers. Even the undertakers, who have been fortunate, are by sudden wealth led into expensive living ; the habit of which continues, when the means of supporting it cease ; and finally ruins them : a just punishment for their having wantonly and unfeelingly ruined many honest, innocent traders and families, whose subsistence was obtained in serving the common interests of mankind.*

And in a letter to David Hartley, Esq. May 8, 1783.

‘ I do not wish to see a new Barbary rising in America, and our long extended coast occupied by piratical states. I fear, lest our privateering success in the two last wars, should already have given our people too strong a relish for that *most mischievous kind of gaming mixed with blood.*’ *Private Correspondence*, p. 530—*Appeal*, p. 9.

The motives for abolishing this practice are so many, that we hardly know where to begin in stating them. If it were not in itself unjust and immoral, we would urge upon nations its inconsistency even with an enlightened policy ; we would shew that it can never be productive of any real advantage to either party in the war ; we would call to mind the many seamen, who are thrown by it into prisons, and thus taken from the service of their country ;* we would speak of the difficulty of procuring sailors to man the fleets, or defend the

* It is said, that at the close of the war ending by the peace of Amiens in 1801, there were 30,000 French sailors in English prisons. (Bonnemant’s D’Abreu, note, p. 27.) It is well known, what numbers of our seamen were thus lost to us for the time in the late war with England,

coasts from invasion, when they are lured by the hope of plunder to embark in long and distant cruises ; we would insist upon the discouragement of the naval service by the higher privileges, which are granted to privateers ; we would bring into view the loss of life, and the distress and poverty brought upon the families of seamen ; we would ask for an instance, in which privateers can be fairly said to have given essential aid in the prosecution of the war, or to have produced any serious impression upon the enemy's resources and strength ; we would refer to the ill will and jealousy excited in neutral nations by the vexation, to which their commerce is exposed from the eagerness of these marauders, and their unwillingness to return from a cruise, without some evidence of vigilance and success. Lastly, we would leave it to history to decide, and challenge the experience of every nation, that has employed privateers in war, whether on the whole the national strength has not been impaired, and its resources diminished, by this expense of its treasure and force in the pursuit of pil-lage.*

Let these considerations be duly weighed by those, who allow of no rule for the conduct of nations, but the greater or less profit to themselves or injury to their enemies, which this conduct may seem likely to produce. Let them reflect upon the words of Franklin, and remember that his opinion and his remarks were founded on experience acquired in a war, in which perhaps, if ever, privateering was a powerful means of annoyance in the hands of one of the parties. With those, who believe that the true interests of a nation can never be separated from a strict regard to religion and moral duty, there are other arguments of greater weight, than any which terminate in mere policy. With them it is enough to determine any action to be impolitic, to know that it is unjust.

What judgment then must we pass upon privateering, if we test it by the rules of a sound morality ? We ask not, what will be its fate if judged of by the dictates of high and honourable feeling, of that elevated morality, which rises far above the ordinary sense of right and wrong, as it is found in the mass of men ; we ask not that it should be condemned or absolved by the sentence of a nice and scrupulous conscience ;

* The French editor of D'Abreu's treatise on Prize Law has strongly expressed the opinion, that it is a mistake to ascribe great efficacy to privateers in war. See note, p. 27. Bonnemant's translation.

we are ready to put the question fairly to the grossest and least reflecting of mankind, be they only honest and unperverted; and we doubt not, that when brought to view the subject in its proper light, stripped of the cloak, which law and custom may have lent to it, the most uncultivated conscience will pronounce it unjust and disgraceful to grow rich upon the spoils of the innocent, to gather by violence the fruits of another's industry. If upon the breaking out of a war every debtor should be declared released from debts due to the subjects of the hostile state, would that man be thought to possess common honesty, who would profit by such an advantage? But how much more palpable is the injustice of attacking, and bearing away as prize the property of that enemy, not found in our own territory, but upon the ocean, the common highway of nations? Let it not then be said, that the law of war has made it yours, and annulled the rights of its former possessor. This law is not the law of reason nor conscience. It is a custom, which has grown out of the selfish and revengeful passions of men, and has been handed down from age to age, receiving now and then some mitigations, by which it has approached nearer to what is suited to a rational nature, but still it is founded in violence, and only one of the few remains of the right of the strongest. Grant, that war is not in itself unlawful. Yet in a ruder age, than the present, it was said by one, who admitted the lawfulness of war, '*militare non est delictum, sed propter prædam militare, peccatum est.*'* Of the justness of this distinction, who can doubt? It is the motive, which determines the character of the action. And what motive has the privateersman but plunder?†

* St. Augustin. Canon. Militare, 59, 1. 'It is not a crime to war, but to war for plunder is sinful.'

† In the letter before quoted of Dr. Franklin to B. Vaughan, Esq. *Works*, vol. ii. p. 447, are two instances of the judgment of an impartial conscience upon this subject. One of a quaker gentleman, who was part owner of a ship, which the other owners thought proper to fit out as a letter of marque, and which took several French prizes. He took his share of booty, but employed an agent to find out by advertisement who were the sufferers, that he might restore what had come to him. The other is of the Scotch presbyterians, who soon after the reformation made an ordinance of the town council of Edinburgh, which is still extant, 'forbidding the purchase of prize goods, under pain of losing the freedom of his burgh for ever, with other punishment at the will of the magistrates, the practice of making prizes being contrary to good conscience, and the rule of treating

Let us once more try this question by the principles of national law, as they are stated by Grotius and others, whose works are of acknowledged authority. It is in the first place to be observed, that there is no pretence of justice to support the practice of capturing private property in war, but what is founded on one or the other of the following principles: 1. That the wrong done extends to every subject of the injured state, and vests in him the same rights, as if that wrong were personal, and that every subject of the offending state is equally responsible in person and property for the injury done by his government, or a fellow-subject, as if he were personally guilty. 2. That each party in the war is to be considered, as it respects other nations, to have a just cause of war. 3. That the war being just, every subject, having the authority of his government, may pursue the enemy in all the modes of lawful warfare, and, if he do it at his own expense, may acquire property to his own use.*

But it is not, nor was it in the age of Grotius, pretended, that the right over the person and property of the enemy is unlimited. And, if we mistake not, these limitations will be found to be established as a part of the national code: 1. That the right to kill is limited to cases of extreme necessity, for the preservation of life and property, ‘and even this last,’ says Grotius, ‘to put men to death for the sake of perishable and uncertain possessions, though in strictness it may stand with justice, is irreconcilable with the law of charity.’ 2. That even in a just war, if more is taken than an equivalent for the debt, or the injury, it is either unjust, or else it is to be kept by way of pledge or security, without any change of property, and to be restored when justice has been obtained. *Grot. lib. 3, cap. xiii. § 1.* 3. That certain classes of persons, among whom are cultivators of the earth and *merchants*, are to be spared. *Lib. 3. cap. xi. § 10, & cap. xiii. § 4.* 4. That where the object of the war is to obtain restitution of what belongs to us, all the subjects are to be considered as sureties one for another; but where the object is to pun-

christian brethren, as we would wish to be treated, and such goods are not to be sold by any christian men, within this burgh.’ This, it will be remarked, extends to all captures.

* Grotius, lib. 3, cap. vi. Puffendorf, lib. 3, cap. vi. *De jure nat. et gent.* Lib. 2, cap. xvi. § 10 et seq. *De officio hom. &c.* Martens, *Droit des gens*, liv. 8. chap. iii.

ish, none but the magistrates, who have refused to inflict punishment themselves, and the actual offenders, can justly be made to suffer. *Lib. 3, cap. xiii. § 1.* 5. That the right of recourse to the goods of the innocent is only subsidiary, and humanity requires that we should not make use of it as long as there is a hope of obtaining justice without it. *Lib. 3, cap. xiii. § 4.* 6. That we have no right to lay waste or destroy, unless with the design and reasonable hope of thereby promoting peace; and that if the same purpose can be otherwise effected, we have no longer this right.*

Now all these principles are violated by the practice of privateering; it assumes a right to kill, not for defending, but to obtain property; it has no regard to the injury done, but seizes whatever falls in its way, and that, not for the use of those who may have suffered from the depredations of the enemy, but for the profit of those concerned in the cruise; it has nothing to do with restitution, but takes with no other intent, than to enjoy a *plenum dominium* over the thing taken, be its value ever so great; it spares no class, much less the merchant, against whom all its attacks are directed; it regards all the enemy's subjects as game to be hunted, without any concern who may have been the authors of the war; it hears to no distinctions between innocent and guilty, debtors and sureties, primary or subsidiary rights; it understands nothing, but that as much wealth is to be gotten, as can be with impunity.

It would be easy to enlarge upon some of these topics, but the unexpected length of this article obliges us to abridge the argument. The distinction between those who bear arms, and those, who are engaged in peaceful occupations, and the principle, that the latter are to suffer no more of the evils of the war, than may be absolutely unavoidable, are now universally recognized. It is only in maritime warfare that they are not adopted in practice. The exemption, as it prevails in hostilities by land, comprehends all those, whose occupations are of a peaceful sort: '*quorum quæstus pacem amat, non bellum.*' It extends, of course, to those, whose business it is to supply by a mutual interchange the wants of different countries. How it should happen, that the moment the merchant embarks his property upon the ocean; the moment

* Martens. *Precis, &c.* tom. ii. p. 349.

he begins to exercise his trade in the very way, in which it yields most benefit to the world, he loses the protection of all laws, and meets the same treatment, as to his property, with the pirate, whose ship is loaded with the gains of violence and treachery, is indeed unaccountable upon any supposition consistent with fairness and equity. ‘The canon,’ says Grotius, in enumerating the exempted classes, ‘adds also merchants; not merely those, who have a temporary residence in the enemy’s country, but those who owe him perpetual allegiance, *nam et horum vita ab armis aliena est.*’ Many of the opinions we have quoted go to the entire neutrality of commerce; and this would be only extending to the sea the humane principles long since adopted on the land. The article already cited from our treaty with Prussia has been understood, as giving protection against public as well as private ships.* Many of the evils connected with privateering are equally to be feared from public captures; the effects upon the habits and morals of seamen will be nearly the same; the cruelty and injustice are the same. A French writer of the year 1744 has asked, ‘would it not then be possible to revive the ancient custom of commercial truces, and to make war, without involving in it commerce and mercantile navigation?’† It may be objected, that the greater the sufferings connected with wars, the less ready will nations be to enter into them, and the sooner will they be disposed to return to a state of peace. But surely the experience of the world is against this. Wars were not less frequent, nor less obstinate, when it was thought lawful to enslave prisoners, to sack towns, and to put to the sword a garrison, which defended itself to the last extremity. The argument would justify every degree of cruelty, it would justify the poisoning of streams and the employment of assassins, it would introduce a law of war no better, than that of the Mohawks. But if to make prize of the property of the innocent is in itself opposed to equity and good conscience, it deserves a double reproach, when it is allowed to be done by privateers. Powers, in their nature oppressive, ought not to be committed to instruments so certain to make them more odious by abuse.‡ A Russian treaty of 1801§

* Martens, *Precis*, &c. tom. ii. p. 352, note.

† *Examen de l’Essai sur la Marine*, p. 181.

‡ *Jus hoc mutandi per vim dominii odiosius est, quam ut produci debeat.* Grotius, *lib. iii. cap. 6, § 5.*

§ Convention with Great Britain, June 17, 1801, art. 4.

prohibits to privateers the right of searching ships sailing under convoy. This cures some part of the evil, and it shows the light, in which privateers are viewed. But the same reason should induce the entire suppression of them.

In all that we have hitherto said, we have gone upon the supposition, that there is a just cause of war. But in every war one party or the other must be fighting in support of an unjust cause. Terrible indeed is the guilt of the subject, who, with no other end than private gain, attacks, kills, and robs the enemy, if in doing this he is at the same time abetting injustice and fraud. Grotius holds to complete restitution every general and soldier, who in an unjust war has assisted in the work of destruction. *Lib. iii. cap. 10, § 3, &c.* Who, then, in any war, can feel so assured, that his country is in no respect chargeable with injustice or rashness, as to be willing, for the sake of plunder, to incur the hazard of so great a guilt? What government can be excused in encouraging its subjects to put their integrity to so perilous a trial? And if there is guilt in fighting for a cause, which we know to be unjust, is there not also guilt in plundering in one, which we are not sure is just?

We had something to say of the effects of privateering upon the morals of the community, and more especially of seamen; of the taste, which it gives for violence and bloodshed; of its breaking down the barriers, by which property is defended; of its tendency to annihilate the distinction of mine and thine. But these consequences are too obvious, and have been proved by too recent experience, to need that we should labour to enforce them. They spring up in our path; they meet our eyes, wherever we go; the land and the sea send forth their reports of murders and piracies and daring robberies, as if the outcasts of society had become emulous of glory, and resolved to hide the disgrace in the magnitude and boldness of their crimes.

It is the laudable purpose of the writer of the Appeal, to call the attention of the proper authorities in the United States to the numberless depredations committed upon the ocean by ships fitted out in our own ports, and sometimes, it is to be feared, by our own citizens. He has diligently collected the statements of writers on the laws of nations, and the provisions of the British and French laws in relation to piracies, and the accepting of commissions from foreign powers; and

he has reviewed our own laws for preventing armaments against nations at peace with us, pointed out their insufficiency, and endeavoured to awaken attention to the importance of new restraints and prohibitions, and a more vigilant and thorough execution of those already existing. For all this he deserves the thanks of the public. Whatever may be thought of cruising against the enemies of our own country, there are few, we trust, who will not agree with Vattel, 'that for strangers it is a shameful trade, to take commissions from a foreign government, for cruising against a nation perfectly innocent in regard to them. The thirst of gold is their only motive, and the commission they receive, however it may screen them from punishment, cannot wipe off their infamy.'* It is agreed by all nations, that a cruiser furnished with commissions from two different sovereigns, is to be treated as a pirate. Much of the reasoning in support of this principle would extend equally to the acceptance of any commission from a foreign belligerent against a nation at peace with us.†

The Memorial, of which we have also spoken, contains a concise and impressive view of the character and consequences of the practice of privateering. It was our intention to avail ourselves of one or two extracts from it, but we have already exceeded our limits.

It may be expected, that we should say something of the practicability of the measure proposed. We must, however, content ourselves with remarking, that there cannot be reason to despair of what all commercial nations must feel it to be their interest by mutual stipulations to effect. The United States, as a great commercial people, disposed by habit and interest to peace, have every inducement, however great may be their local advantages for carrying on a predatory warfare, to enter into such an arrangement. Great Britain can expect no benefit from the continuance of the practice of privateering. Holland, France, and Spain have too much interest in the revival of their fallen commerce not to acquiesce cheerfully in a proposal, which takes away one of its greatest vexations. Russia, Sweden, and Denmark are friends to the freedom of commerce, and it is a remarkable and encouraging

* Vattel, liv. 3, ch. 15, § 229.

† See, as to double commissions, D'Abreu, part 2, p. 2. Bonnemant's translation.

fact, that Russia made no use of privateers in the Archipelago, in her war with Turkey, 1767—1774.

We are disposed to think well enough of mankind, to believe that there is something in this practice too harsh and illiberal to be much longer born, in the present improved state of knowledge and manners. We trust, the time is coming, when the greater part of the civilized world will feel the truth of these words of Clarendon : ‘ Indeed, it must be a very savage appetite, that engages men to take so much pains, and to run so many and great hazards, only to be cruel to those, whom they are able to oppress.’*

* Tracts, p. 206.